No. 89-339

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

VALERIE NOEL STEELE,

Petitioner,

vs.

O.C. NOEL, JR. as Surviving Executor of the Estate of OGDEN C. NOEL, Deceased, and JEAN HYMAN as Executrix of JULIAN H. HYMAN, Deceased Co-Executor,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Supreme Court under 28 U.S.C. § 1257(a) have jurisdiction by writ of certiorari to review a state court decision under a constitutional claim when that state court's judgment rests on independent and adequate state grounds, and the state's highest court has deemed the constitutional issue to be insubstantial and not directly involved in the case?

2. Whether petitioner has pointed to anything in New York state law suggesting that she has a *legitimate* claim of entitlement to a specific benefit amounting to a discernible property interest for due process purposes, as distinguished from a mere expectancy or abstract desire for same, under the rationale of *Perry v. Sindermann*, and if so, whether the Surrogate abused his discretion in dismissing the petitioner's objections to the executors' account when it was abundantly clear that identical objections had been dismissed by a court of coordinate jurisdiction in a proceeding in which she had a full and fair opportunity to litigate the issues with no appeal or move to renew or reargue having been taken by petitioner therefrom?

LIST OF PARTIES CLARIFIED

VALERIE NOEL STEELE, petitioner, daughter of Ogden C. Noel, decedent, and fifty (50%) per cent beneficiary under the terms of decedent's Last Will and Testament.

OGDEN C. NOEL, JR., co-respondent, son of Ogden C. Noel, decedent, nominated and surviving co-executor and fifty (50%) per cent beneficiary under the terms of decedent's Last Will and Testament.

JEAN HYMAN, co-respondent, surviving spouse and executrix of the estate of JULIAN H. HYMAN, ESQ., who was nominated co-executor under the terms of the Last Will and Testament of Ogden C. Noel and served in that capacity until his death on October 13, 1985.

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BRIEF IN OPPOSITION FOR RESPONDENTS

OPINIONS BELOW

The Decision of the New York Supreme Court, Albany County, (Conway, J.), dated March 22, 1982, appointing Florence Noel Hodgkins as conservatrix of decedent Ogden C. Noel's person

and property, is not reported and is found in the Appendix hereto at 1a.

The Judgment of the New York Supreme Court, Albany County, (Conway, J.), ordering that Florence Noel Hodgkins be appointed conservator of the person and property of Ogden C. Noel, is not reported, and is found in the Appendix hereto at 5a.

The Opinion of the New York Supreme Court, Appellate Division, Third Department, affirming the appointment by the Supreme Court, Albany County, (Conway, J.) of Florence Noel Hodgkins as conservatrix of decedent Ogden C. Noel's person and property, is reported as *In the Matter of the Appointment of a Conservator of the Property of Ogden C. Noel,* 92 A.D. 2d 1053 (3rd Dept., 1983), and is found in the Appendix hereto at 11a.

The Decision of the New York Supreme Court, Albany County, (Conway, J.) dated January 25, 1983, directing the firm of Ernst and Whinney to complete an audit of the Ogden C. Noel conservatorship estate for the period January 1, 1970 through and including 1981, at a cost of $25,000, is not reported, and is found in the Appendix hereto at 13a.

The Decision of the New York Supreme Court, Albany County, (Conway, J.), mailed March 21, 1985, based on a hearing held in chambers on October 9, 1984, dismissing petitioner's objections to the final account of the conservatrix, is not reported, and is found in the Appendix hereto at 21a.

The Decree of the New York Surrogate's Court, Westchester County, (Brewster, S.) dated January 7, 1985, appointing Ogden C. Noel, Jr., and Julian H. Hyman, Esq., executors of decedent's estate, is not reported, and is found in the Appendix hereto at 24a.

The Order of the New York Surrogate's Court, Westchester County, (Brewster, S.) dated March 30, 1987, dismissing certain of petitioner's objections to the final accounting of the executors of decedent's estate, is not reported, and is found in the Appendix hereto at 31a.*

The Decision of the New York Surrogate's Court, Westchester County, (Brewster, S.), dated February 19, 1987, dismissing Part I of petitioner's objections to the final account of the executors relating to twenty-five (25) items which refer to assets which were owned by the decedent prior to December 31, 1981, is not reported, and is found in the Appendix hereto at 34a.

The Decision and Order of the New York Supreme Court, Appellate Division, Second Department, entered August 1, 1988, unanimously affirming the Surrogate' s dismissal of the challenged objections as being appropriate, and dismissing petitioner's due process argument as being without merit, is reported as *In the Matter of Ogden C. Noel, deceased,* 143 A.D. 2d 98 (2nd Dept., 1988), and is found in the Appendix hereto at 37a (first appeal)*.

The Slip Opinion of the New York Court of Appeals, entered November 29, 1988, dismissing petitioner's appeal of the Appellate Division Decision and Order entered August 1, 1988 on finality grounds, is found in the Appendix hereto at 39a.

The Order of the New York Surrogate's Court, Westchester County, (Brewster, J.) dated October 1, 1987, which dismissed petitioner's objections to the executors' commissions and legal fees, and set executors' commission and attorneys' fees is not reported, and is found in the Appendix hereto at 40a.*

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* Denotes that the opinion is sought to be appealed in the Petition for Writ of Certiorari.

The Decision and Order of the New York Supreme Court, Appellate Division, Second Department, entered February 6, 1989, unanimously affirming the Surrogate's appointment of the executors and setting of legal fees and executor's commissions, dismissing petitioner's claims of professional misconduct on the part of the attorneys for the estate as being without merit, is reported as *In the Matter of Ogden C. Noel, deceased,* 147 A.D. 2d 485 (2nd Dept., 1989), and is found in the Appendix hereto at 46a (second appeal).*

The Slip Opinion of the New York Court of Appeals dated June 8, 1989, dismissing petitioner's appeal from the Appellate Division Order dated February 6, 1989, *sua sponte* and, *inter alia,* dismissing petitioner's appeal from the Surrogate's Order dated March 30, 1987, *sua sponte*, is found in the Appendix hereto at 49a.*

PRELIMINARY STATEMENT

Respondents do not accept petitioner's statement of jurisdiction and have restated the questions involved. Because petitioner's statement of the case does not fairly describe the portions of the record below supporting the judgments entered, respondents will provide their own statement.

In general, the Supreme Court does not have jurisdiction over this appeal. The petition for a writ of certiorari is both frivolous and specious and should be summarily denied as inappropriate for this Court's determination.

Petitioner attempts to invoke 28 U.S.C. § 1257(a) as her entree to jurisdiction before the Supreme Court yet the facts of

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* Denotes that the opinion is sought to be appealed in the Petition for Writ of Certiorari.

this case fail to meet the criteria or jurisdictional predicate for a grant of certiorari as concerns cases emanating from state courts.

As stated by Justice Brennan, the following facts will motivate this Court to grant certiorari in cases coming from state courts:

> "Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. First, the federal question must be a substantial question. Second, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. Third, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law. But whether there is a substantial question and whether it was properly raised in the state courts and whether, even so, the state court decision can be rested on an independent state ground are not always easy questions. The parties differ on one or more of them and we of the Court are not always in agreement."[1]

The question sought to be raised in the petition does not qualify as worthy of consideration by the Supreme Court for the

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1. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* ¶4.26 (6th ed. 1986) *citing* Justice Brennan, *State Court Decisions and The Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399, 400 (1960).

following reasons: the decisions below turn upon quite specific facts; the decisions below are correct without regard as to the question sought to be raised in the petition; the decisions below rest on adequate and independent state grounds irrespective of any alleged federal claim; and petitioner has failed to demonstrate the importance of the issue "to the general public" as distinguished from the "importance to the particular parties" involved.[2]

For a more detailed argument on the jurisdictional issue, I refer this Honorable Court to the jurisdictional argument set out under the heading "Reasons for Denying the Writ", *infra* at 15.

STATEMENT OF THE CASE

Overview

The long and tortuous odyssey of this case through the courts of the State of New York began in 1982 when petitioner and her husband, George S. Steele, Esq. who is listed on the brief as counsel of record, sought and were refused conservatorship rights over the person and property of petitioner's father Ogden C. Noel, (now deceased) in the Supreme Court, Albany County. Petitioner's quest to seize control over her father and his property was fueled by an unrelenting jealousy of her older and now deceased brother Norbert L. Noel. Norbert L. Noel, an attorney for the New York State Thruway Authority, had assumed the arduous and time consuming task of assisting his father Ogden C. Noel with his personal and financial affairs after the elder Mr. Noel had been mugged and physically assaulted in or about 1977. Norbert L. Noel, motivated strictly by love and affection, made deposits for decedent, paid his bills, and acted as chauffeur, housekeeper and friend to decedent. The relationship continued until Norbert L.

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2. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955).

Noel's untimely death in 1981.

From 1982 to date, petitioner embittered by this sibling rivalry has availed herself of the due process opportunities afforded to her by the courts of the State of New York and has used its motion practice rules to their outer limits. She has instituted proceedings in three trial-level courts, taken appeals to two Appellate Division Departments and sought entrance to the New York Court of Appeals on two occasions. In each instance when a New York court has ruled, it has ruled in favor of respondents and dismissed petitioner's allegations as without merit. Petitioner's insistence on litigating through appeal, each and every issue in this case, including the simple matter of agreeing to a headstone and arranging for perpetual care, has generated a horrendous amount of legal hours for the attorneys representing this estate in order to counter petitioner's obstructive actions. It should be noted at the outset that petitioner has gained no decided advantage by her actions — because she has always been an *equal beneficiary* of her father's estate.[3] The end result, therefore, has been that her actions have reduced the estate by the amount of legal fees engendered by her specious actions. Therefore, the other equal beneficiary, petitioner's surviving brother, Ogden C. Noel, Jr., who is the surviving executor, has, in essence, been forced to bear his financial share of this battle including the cost of this frivolous application to the United States Supreme Court. Sanctions against petitioner under Rule 11 are the only remedy for the nightmare of litigation she has caused.

For a detailed history of the record below, this Honorable

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3. Under New York Surrogate's Court Procedure Act 1410, petitioner had no right to file objections. The statute requires that one's "interest in property or the estate of the testator . . . be adversely affected by the admission of the will to probate." As an equal beneficiary under said Will petitioner cannot make this claim.

Court will find lodged herewith as exhibits to be read in conjunction with respondent's brief, each of respondent's briefs submitted to the Supreme Court, Appellate Division, Second Department in opposition to the two appeals to that Department filed by petitioner.

Procedural History

Following a hearing in the New York Supreme Court, County of Albany, brought on by Order to Show Cause of petitioner and her husband, George S. Steele, Esq., (listed on petitioner's brief as counsel of record) and upon cross-petition of Ogden C. Noel, Jr., respondent, the court issued a Memorandum Decision dated March 22, 1982 (1a) and a Judgment dated April 15, 1982 (5a) denying petitioner' application to be appointed conservator and granting cross-petitioner's application to appoint the conservator's sister Florence Noel Hodgkins, conservator of Ogden C. Noel, Sr.'s person and property. The Supreme Court, Appellate Division, Third Department affirmed Ms. Hodgkins' appointment taking specific note of the "long standing familial dissension" between petitioner Valerie Noel Steele and cross-petitioner Ogden C. Noel, Jr., (respondent herein) "concerning the claimed mismanagement of the Conservatee's property and affairs by the latter's oldest son during his lifetime, (which) permeates the record." The Third Department stressed that "the parties were fortunate that a knowledgeable family member could be found to perform the task; rancor between family members often begets the appointment of strangers." (*citing Matter of West,* 13 A.D. 2d 599 at 1054) (11a).

The same allegations that are found in the Petition before this Honorable Court and in the objections to the executor's final accounting were first voiced by petitioner during numerous informal conferences with Justice Edward S. Conway, Supreme Court, Albany County, in the proceeding for appointment of a

conservator. The actual formal objections to the account of the conservatrix were sworn to by petitioner on August 28, 1984.[4]

Because of the unrelenting attack of petitioner on the character of her deceased brother, Norbert L. Noel, and in response to a myriad of motions and objections filed by petitioner in the Supreme Court conservatorship proceeding and after a hearing held in chambers on January 25, 1983, Justice Conway by Decision directed that an independent audit be made of all decedent's financial records for the period *January, 1970 through and including 1981* (17a). Justice Conway chose the well-respected accounting firm of Ernst and Whinney to complete the audit, and directed that they accomplish same for the fee of $25,000. Five auditors from Ernst and Whinney spent approximately eight weeks at the office of Hyman & Gilbert, P.C., analyzing and sorting through all of decedent's financial records for the eleven year period.

The *complete audit* of Ernst and Whinney from 1970 through 1981[5], is summarized by David L. Malane, a partner of said firm, in excerpts as follows (18a-20a):

> a. "We found nothing in the reviewed information to indicate that any securities were missing."
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> b. "In 1976, Ogden transferred the house at 22 Coolidge Avenue, White Plains, to Norbert. Other than this transfer, Ogden's records and notes regarding loans, gifts and other transactions with family members indicate he attempted to treat all

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4. *See* Appeal Brief dated August 16, 1988 at A226-A238.

5. *See* Appeal Brief dated August 16, 1988 at A238-A278.

family members equal and he noted his reasons for transferring or not transferring amounts. We found nothing to indicate that any family member received substantially more funds than any other member."

c. "Subject to the fact that there were missing passbooks, our analysis shows that there were no substantial amounts of withdrawn funds that cannot be explained or assumed transferred to other accounts."

d. "Other than missing savings account passbooks, we found the financial records to be in good order. We found nothing in (these) financial records indicating that any securities or funds were missing or misappropriated."

Based upon the findings and results of the aforesaid Ernst and Whinney audit, the respondents herein were fully convinced that no further investigation was necessary.

Whereupon, on May 9, 1984, (28 days subsequent to conservatee Ogden Noel's death) a final inventory and account was submitted to the Supreme Court, Albany County by the conservatrix, Florence Noel Hodgkins for the period April 15, 1982 through April 11, 1984, together with the report from Ernst and Whinney concerning decedent's assets, accounting for her actions as conservatrix.[6]

Notice of this accounting was served upon all interested parties, and as had become "de rigeur", once again, objections thereto, dated August 28, 1984, were filed by appellant herein.

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6. *See* Appeal Brief dated August 16, 1988 at A279-A377.

As is apparent from a reading of same, petitioner was reiterating the identical objections raised numerous times before in chambers with Justice Conway.

By written decision mailed March 21, 1985, (21a), based on a hearing held in chambers on October 9, 1984 at which Petitioner was present, and by further Order of Justice Edward S. Conway, Justice of the Supreme Court, Albany County, dated March 22, 1985 (Pet. App. A1-A8), the objections filed by Valerie Noel Steele, petitioner herein, to the final account of the conservatrix were *dismissed*. Mr. Justice Conway further approved, allowed and judicially settled the account submitted by the conservatrix. After providing for the payment of fees, allowances and expenses, the order directed that the balance remaining (listed as Schedule "C" thereof entitled "Balance on Hand") be transferred to the executors of decedent's estate. Schedule "A" of the executor's accounting[7] is a precise recapitulation of the cash on hand as per the conservatrix accounting. NO APPEAL WAS EVER TAKEN BY VALERIE NOEL STEELE TO MR. JUSTICE CONWAY'S FINAL ORDER DATED MARCH 22, 1985 AND APPELLANT'S TIME TO APPEAL HAS LONG SINCE EXPIRED. This matter then proceeded to the New York Surrogate's Court, Westchester County, the court with manifest jurisdiction over decedent Ogden C. Noel's estate subsequent to his death on April 11, 1984.

After extensive litigation in the Surrogate's Court, Westchester County, as to the appointment of an executor for decedent's estate and upon withdrawal of objections raised by Valerie Noel Steele, by Decree of said court dated January 7, 1985, Ogden C. Noel, Jr. and Julian H. Hyman were appointed executors of said estate (24a). Between 1985 and 1987, petitioner initiated a multiplicity of proceedings on an array of matters too numerous to detail

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7. *See* Appeal Brief dated August 16, 1988 at A41-A71.

in this limited amount of space, which were heard before the Surrogate's Court in relation to this estate.

Then on the 30th day of March, 1987, an Order was signed by the Honorable Evans V. Brewster, Surrogate of Westchester County, granting the motion of respondents herein to dismiss Part I of the objections raised by Valerie Noel Steele, against the accounting of the executors of decedent Ogden C. Noel's estate (31a). A Memorandum Decision of the Surrogate dated February 19, 1987, served as the basis of his March 30th Order (34a). An incomplete copy of the objections raised in the Surrogate's Court action by Valerie Noel Steele, verified on October 6, 1986, are found at Pet. App. A18-A22.

The Surrogate Court's primary reason in deciding against petitioner in the court below is the doctrine of collateral estoppel in that identical issues were raised and actually and necessarily determined against petitioner by the Honorable Edward S. Conway, Justice of the Supreme Court, Albany County, in his previous Final Decision reached in chambers on October 9, 1984 (mailed on March 21, 1985) (21a) and the Final Order consistent therewith, dated March 22, 1985 (Pet. App. A1-A8), handed down in the prior conservatorship proceeding wherein the motion was filed to judicially settle the final account of the conservatrix upon the death of decedent. No appeal was taken by petitioner from Justice Conway's final order dated March 22, 1985 dismissing her objections to said final account of the conservatrix. Therefore, these identical issues cannot now be raised on appeal to this tribunal, nor, as Surrogate Brewster reasoned, could they be raised in the Surrogate's Court as petitioner's time in which to appeal said Supreme Court order had long since expired, thus invoking the kindred rules of collateral estoppel, *res judicata* and law of the case.

The Supreme Court Appellate Division, Second Department,

unanimously affirmed on August 1, 1988 finding, *inter alia*, that the Surrogate's dismissal of the challenged objections was appropriate, as those objections referred to the alleged misappropriation and waste of assets owned by the decedent during his lifetime and prior to the appointment of a conservatrix to oversee his affairs. The appellate court further ruled that the Surrogate had properly construed the previous order of the Supreme Court, Albany County, which judicially settled the account of the conservatrix as having disposed of the identical objections raised in the present proceeding, *citing Schuylkill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304 (1929). In the course of its opinion the Appellate Division addressed petitioner's contention that she had been deprived of due process. The Appellate Division found that petitioner's due process argument was "without merit, as she had received notice of and exercised her opportunity to be heard in prior extensive litigation regarding all aspects of the decedent's affairs." (38a).

Petitioner's first attempt to appeal both the Appellate Division and Surrogate's Court decisions was dismissed by the New York Court of Appeals on November 29, 1988 *sua sponte* on finality grounds since at that point in time petitioner had a second appeal on this matter pending before the Second Department (39a).

Prior thereto, by Order dated October 1, 1987 the Surrogate's Court, Westchester County *inter alia* had dismissed Part II of petitioner's objections to the executors' account in reference to commissions and legal fees, and approved the final account (40a).

The Supreme Court, Appellate Division, Second Department, *unanimously affirmed* the second appeal on February 6, 1989 finding, *inter alia*, that the executors were validly appointed by the Surrogate pursuant to the terms of decedent's will over the objections of petitioner, that petitioner had alleged a conflict of interest and was now raising the same objections under the guise

of challenging the executor's commissions contained in the accounting. In the course of its decision, the Second Department stressed that since petitioner had " failed to appeal the decree appointing the executors, any challenge to the validity of their appointment was barred by the doctrine of collateral estoppel", *citing generally, Schuylkill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304. The appellate court further noted that petitioner's claims concerning misconduct on the part of the executors in re failure to recover assets allegedly wasted during decedent's lifetime "were considered on the previous appeal in which the court sustained the Surrogate's dismissal". The court also noted that petitioner had "failed to raise any new claims of mismanagement or misconduct on the part of the executors since their appointment which would warrant removal (SCPA 711) or the denial of their commissions (*see, Matter of Bournes*, 7 Misc. 2d 848)". In a final reference, the court dismissed as "without merit" (petitioner's) "claims of professional misconduct on the part of the attorneys for the estate", *citing Matter of Freeman*, 34 N.Y. 2d 1, specifically holding that under New York law "the Surrogate bears the ultimate responsibility to decide what constitutes reasonable compensation", *citing Matter of Van Hofe*, ____ A.D. 2d ____ (2nd Dept., 1988) (47a-48a).

On petitioner's second appeal to the New York Court of Appeals the state's highest court by Slip Opinion dated June 8, 1989 dismissed petitioner's appeal from the Appellate Division order dated February 6, 1989, *sua sponte*, upon the ground that "no substantial constitutional question was directly involved". The Court of Appeals also dismissed petitioner's prior appeal from the Surrogate's Court order dated March 30, 1987, *sua sponte*, upon the ground that "a separate appeal does not lie from that order which has been affirmed by the Appellate Division", *citing* N.Y. Const., Art. IV, Sec. 3; CPLR 5601 (49a).

REASONS FOR DENYING THE WRIT

I.

THE SUPREME COURT UNDER 28 U.S.C. § 1257(a) DOES NOT HAVE JURISDICTION UNDER A CONSTITUTIONAL CLAIM WHEN A STATE COURT JUDGMENT RESTS ON INDEPENDENT AND ADEQUATE STATE GROUNDS AND THE STATE'S HIGHEST COURT HAS DEEMED THE CONSTITUTIONAL ISSUE TO BE INSUBSTANTIAL AND NOT DIRECTLY INVOLVED IN THE CASE.

Petitioner's asserted basis for invoking this Court's jurisdiction to issue a writ of certiorari to the New York Court of Appeals is that the Surrogate denied the petitioner due process by precluding further discovery or trial on the merits of her objections to the executor's accounting for the estate of Ogden C. Noel. That specific contention does not merit this Court's review because the state court judgments rendered in this matter were resolved under authority of clear New York precedent.

> "The most important restriction on Supreme Court review of state court decisions of federal claims — whether review is sought by appeal or by certiorari — is that the judgment necessarily turn on the federal question and that it not rest upon an independent state ground. Even if the decision is based on alternative grounds, one federal and one state, review will be denied."[8]

> "Where both state and federal questions are

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8. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S. Ct. 2849, 2853-54, 53 L. Ed. 965, 971-972 (1977).

> involved in a state proceeding, a jurisdictional problem not infrequently arises as to whether the state court judgment rests on a state law ground or a federal ground. If in fact the judgment rests on a state ground, the Supreme Court has no jurisdiction to review the case. In this circumstance, the state court's ruling with respect to the federal question, even though (it might be) arguably wrong, becomes superfluous and thus incapable of triggering Supreme Court jurisdiction. And the ruling as to the state issue necessarily reduces the case to the vast field of garden variety state court judgments, dealing with state law only. These judgments, as Justice Brennan once put it, 'not only cannot be overturned by, (but) indeed are not even reviewable by the Supreme Court of the United States. We are utterly without jurisdiction to review such cases.' "[9]

This Court has consistently ruled that when a state court ground is both independent and adequate to support the judgment "this court will not assume jurisdiction of the case."[10]

Messers Stern, Grossman and Shapiro in their treatise *Supreme Court Practice*, call attention to the Court's rationale for its inability to review state court judgments of this nature. The Court's rationale was articulated in the leading case of *Herb*

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9. R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* ¶3.25 (6th ed. 1986) *citing* Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).

10. R. Stern, E. Gressman, S. Shapiro, *supra*, ¶3.25 at 168, 169 *citing Klinger v. Missouri*, 13 Wall. 257, 263 (1871), *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See also, Murdock v. Memphis*, 20 Wall. 590, 636 (1875); *Berea College v. Kentucky*, 211 U.S. 45, 53 (1908).

v. Pitcairn[11], which states:

> "[I]t is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion."

See also, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977); *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981); *Michigan v. Long*, 463 U.S. 1032 (1983). The "independent and adequate state ground" rule is thus a corollary of the fundamental principle that the Court lacks jurisdiction to review matters of state law. That principle in turn reflects the Article III limitations on federal judicial power, as well as the jurisdictional restrictions imposed on the Court by 28 U.S.C. § 1257.

It is clear from a reading of the Appellate Division decisions in this matter, which in essence were affirmed by the New York Court of Appeals when the highest court dismissed petitioner's two appeals, that the state court judgments rest on adequate nonfederal grounds thus are not appropriate for exercise of the Supreme Court's discretionary certiorari jurisdiction.

Both appellate court decisions rest on the leading case on

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11. 324 U.S. 117, 125-126 (1945).

the issue of collateral estoppel in New York namely, *Schuylkill Fuel Corp. v. Nieberg Realty Corp.* The classic statement of the rule is the language of Chief Judge Cardozo:

> "A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first."[12]

Since *every* single item listed by petitioner in Part I of her objections in the Surrogate's Court final accounting of executors proceeding was an objection to an act allegedly committed by her deceased brother (a nonconservator and nonfiduciary) during the period 1970 until 1981, the Surrogate rightfully determined that all of petitioner's allegations had been raised, addressed, and satisfied in the Supreme Court conservatorship proceeding. In said proceeding held in Supreme Court chambers on October 9, 1984 Justice Conway approved the audit report completed by the firm of Ernst & Whinney, dismissed all of petitioner's objections, approved the final account of the conservatrix, and then discharged and released Florence N. Hodgkins, conservatrix and Transamerica Insurance Company, the surety on her bond. The justice's decision was announced in the presence of all interested parties, including Valerie Noel Steele, petitioner herein; said decision then was mailed on March 21, 1985 *with no appeal ever having been taken therefrom*.

Therefore, the causes of action *sub judice* were the same since the second cause of action (Surrogate's Court) arose out of the same transaction as did the first (Supreme Court, Albany County),

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12. 250 N.Y. at 306-307.

with the same identity of parties thus invoking the New York rule embodied in *Schuylkill.*

This Court is compelled to follow New York law as embodied in *Schuylkill.*

Since *Schuylkill* is clearly controlling here, there is no reason for the court to grant certiorari in this case. There are adequate and independent state grounds to sustain the state court decisions below. Given this reality, petitioner demonstrates nothing in her petition that should reasonably motivate an exercise of this Court's jurisdiction.

II.

PETITIONER HAS POINTED TO NOTHING IN NEW YORK STATE LAW SUGGESTING THAT SHE HAS A LEGITIMATE CLAIM OF ENTITLEMENT TO A SPECIFIC BENEFIT AMOUNTING TO A DISCERNIBLE PROPERTY INTEREST FOR DUE PROCESS PURPOSES, AS DISTINGUISHED FROM A MERE EXPECTANCY OR ABSTRACT DESIRE FOR SAME, UNDER THE RATIONALE OF *PERRY V. SINDERMANN*, NOR DID THE SURROGATE ABUSE HIS DISCRETION IN DISMISSING PETITIONER'S OBJECTIONS TO THE EXECUTORS' ACCOUNT WHEN IT WAS ABUNDANTLY CLEAR THAT IDENTICAL OBJECTIONS HAD BEEN DISMISSED BY A COURT OF COORDINATE JURISDICTION IN A PROCEEDING IN WHICH SHE HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUES WITH NO APPEAL OR MOVE TO RENEW OR REARGUE HAVING BEEN TAKEN BY PETITIONER THEREFROM.

Petitioner's claim of violation of constitutional guarantees of due process is without substance. It is well understood that

both the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 6 of the Constitution of the State of New York allow procedural due process in that "no person shall be deprived of life, liberty or property without due process of law." With those guarantees as the criterion, the federal courts and the New York state courts have outlined the basic principle that due process/procedure is required before a government agency may take a person's "life, liberty or property." Fair procedures require, at least, an opportunity to present objection to the proposed action to a fair and neutral decision-maker. Petitioner has been afforded every conceivable opportunity to present her objections to *three* (3) trial-level courts of New York, to-wit: Supreme Court, Albany County; Supreme Court, New York County (where petitioner improperly initiated a discovery proceeding) and Surrogate's Court, Westchester County. Now she alleges that all of these courts did not provide her with due process of law in the discovery process. This Honorable Court must reject petitioner's constitutional challenge since it is the epitome of speciousness.

The essence of procedural due process is that a person must be afforded notice and an opportunity to be heard before government may deprive him of liberty (*e.g.*, incarceration) or a recognized "property" interest.[13]

However, procedural protections alone, absent an underlying substantive entitlement to same, do not constitute a protected interest for due process purposes. Before a person can assert procedural due process rights, she must demonstrate that she has been deprived of an interest that could invoke procedural due

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13. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950).

process protection as articulated by this Court in *Perry v. Sindermann.*[14]

The term "property" denotes more than actual ownership of realty, chattels or money — it includes "interests already acquired in specific benefits." This requires more than an abstract need or desire for (or a unilateral expectation of) the benefit. "There must be a legitimate claim to the benefit" under state (or federal) law.[15] Petitioner has failed to establish the legitimacy of her claim under any New York state statute.

Futhermore, the test for whether a prior evidentiary hearing is required is set out in the leading case of *Matthews v. Eldridge* and is determined by weighing:

a. the importance of the individual interest involved;

b. the value of specific procedural safeguards to that interest; and

c. *the governmental interest in fiscal and administration efficiency.*[16] (emphasis added.)

Thus the standard test of procedural adequacy under the due process clause, that of *Matthews v. Eldridge*, merely requires a comparison of the costs and benefits of getting petitioner more elaborate procedure than she actually received.[17]

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14. 408 U.S. 593, 599, 92 S. Ct. 2694, 33 L. Ed. 2d 570. *See also, Lyon v. Farrier*, 727 F. 2d 766, *cert. denied*, 105 S. Ct. 140, 469 U.S. 839, 83 L. Ed. 2d 79 (1984).

15. *Board of Regents v. Roth*, 408 U.S. 693 (1976).

16. 424 U.S. 319 (1976).

17. *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, *cert. denied*, 105 S. Ct. 828, 469 U.S. 1145, 83 L. Ed. 2d 820 (1984).

Clearly, all the courts in New York who have been faced with petitioner's objections have scrutinized them at length. The scope of each such scrutiny was well within the constitutional guidelines set by the United States Supreme Court. Three trial-level courts in New York have ruled prior hereto that petitioner has not articulated a "legitimate" claim to pursue her discovery requests or that she would be entitled to any further funds (property) from decedent's estate or the estate of her deceased brother.

Three trial-level courts of this state have heard virtually identical objections and have dismissed petitioner's objections as having no substance or basis. These rulings have consistently been sustained on appeal with respondent being awarded costs. There was no abuse of judicial discretion on this point. It should be noted that petitioner has failed to pay in full all costs awarded by the Appellate Division, Second Department, yet has the audacity to once again appeal to a higher authority, wasting valuable judicial time on unfounded objections. This should not be countenanced by this Honorable Court.

On each such occasion petitioner has had notice of the proceeding and ample opportunity to be heard. Petitioner has even used the state courts to institute an improper disclosure proceeding in Supreme Court, New York County. Petitioner had her opportunity to be heard whether it was via a hearing, in conferences in chambers, or via motions submitted on papers both with and without oral argument. Petitioner has had more than ample opportunity to protect her rights in the courts of New York as the herein facts have borne out. Therefore petitioner's due process argument should fall.

Furthermore, it is respectfully submitted that the due process clause is not an inflexible rubric and the procedural protections demanded by it will vary according to the factual circumstances

of a particular case and the nature of the right to be adjudicated. Under the rule articulated by this Court in *Cafeteria Workers v. McElroy,* due process is not a matter of automatic application, and a full evidentiary trial-type hearing as petitioner maintains should have occurred in Surrogate's Court prior to dismissal of her objections, was *not* required, and is not required in every conceivable case of alleged government impairment of a private interest.[18]

The end result is that three trial-level courts of New York have previously ruled on virtually identical objections. Each has stated that petitioner is not entitled to further discovery of the financial and tax records of decedent Ogden C. Noel or his predeceased son Norbert L. Noel because petitioner has not proven entitlement to same. The executors to whom letters were issued by the Surrogate's Court are the only parties who have the power and are under a duty to make inquiry into alleged improprieties. They have made such inquiry complete with an independent audit from the esteemed accounting firm of Ernst & Whinney for the period 1970 through 1981 to satisfy themselves and the courts (at a cost to the estate of $25,000) that petitioner's objections are unfounded. Petitioner has used the discovery process to the limits permissible in the courts of New York State. The estate representatives have had to meet and refute every ludicrous allegation posed by petitioner since 1981. In the interim, the estate has had to absorb extensive legal fees to combat petitioner's irrational arguments.[19]

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18. 367 U.S. 886, 894, 81 S. Ct. 1743 (1961). *See also, Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), wherein the Supreme Court held that the requirements of the due process clause are not technical, nor is any particular form of procedure necessary.

19. *See* Affidavit of Legal Services of Rita K. Gilbert dated May 4, 1987, annexed in Appeal Brief dated August 16, 1988 (72-81).

Furthermore, the vast majority of the cases cited by petitioner in her due process argument are inopposite to the case *sub judice*. They concern areas within which the courts are required to give the strictest of scrutiny, *e.g.*, hearing required before person is incarcerated for willful violation of a court order [*Aftuck v. Aftuck*, 100 A.D. 2d 672 (3rd Dept., 1984)]; hearing required before respondent-appellant's daughter is remanded into the custody and control of the Department of Social Services [*Matter of Barbara R.*, 66 A.D. 2d 800 (2nd Dept., 1978)]; hearing required prior to superintendent's proceeding finding inmate guilty of certain institutional violations which resulted in additional confinement [*Massop v. LeFevre*, 127 Misc. 2d 910 (Sup. Ct., Clinton Cty., 1985)]; respondent-appellant received no notice of hearing at which unemployment benefits were denied [*Harper v. Levine*, 41 A.D. 2d 975 (3rd Dept., 1973)]; right to counsel in termination of parental rights hearing is guaranteed [*In Re Custody of Orneika, J.*, 112 A.D. 2d 78 (1st Dept., 1985)].

It should also be noted that petitioner's reliance on *Snaidach v. Family Finance Corp.*[20] and its progeny concerning prejudgment garnishment procedures is not relevant whatsoever to this case. In *Snaidach* under a Wisconsin statute defendant was served with a Summons and Complaint on the same day as the garnishee. Defendant moved to have the garnishment proceeding dismissed for failure to satisfy the due process requirements of the Fourteenth Amendment. On certification the Supreme Court struck down the statute. In an opinion by Douglas, J. it was held that the Wisconsin prejudgment procedure whereby defendant's wages are frozen in the interim between garnishment and culmination of the lawsuit without defendant having a chance to be heard is violative of due process. The facts of the case at bar are completely inopposite to *Snaidach*.

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20. 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 349 (1969).

It is respectfully submitted that petitioner has not articulated a discernible property right that she alleges has been denied her by the Supreme Court or Surrogate's Court when said courts dismissed her objections. Nor has petitioner overcome her burden of proving that she had a legitimate claim to same. Furthermore, petitioner received an equal share of her deceased father's estate and thus has no grounds for the filing of objections at all.[21]

This Honorable Court should find that the courts below have not violated either the state or federal Constitutions and have followed fundamental notions of procedural due process; that petitioner was given notice and an opportunity to be heard prior to said courts dismissing her objections; and that petitioner has not been deprived of any property interest by said state action.

The New York Court of Appeals, which has an admirable tradition of leadership in adjudging federal rights, has ruled that there is "no substantial constitutional question directly involved" in this case.[22]

Similarly, the Supreme Court, Appellate Division, Second Department has stated that petitioner's "claim that the failure to hold a hearing with respect to her objections amounts to a denial of due process is without merit, as she had received notice of and exercised her opportunity to be heard in prior extensive litigation regarding all aspects of the decedent's affairs."[23]

Thus, there is no fundamental unfairness sufficient to offend the due process clause in any of the Decisions of the New York Court of Appeals, the New York Supreme Court, Appellate

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21. New York Surrogate's Court Procedure Act, Section 1410.

22. Slip Opinion dated June 8, 1989 at Appendix 49a.

23. 143 A.D. 2d 98 at Appendix 38a.

Division, Second Department, the New York Surrogate's Court, Westchester County, or the New York Supreme Court, Albany County, to which petitioner refers. The Petition insofar as it seeks further review by this Court of those determinations, should be denied.

CONCLUSION

For the foregoing reasons, petitioner's request for the grant of a Writ of Certiorari should be denied in its entirety.

Respectfully submitted,

RITA K. GILBERT
Counsel of Record
HYMAN & GILBERT
Attorneys for Respondents

DONNA R. KRAMER
Of Counsel

APPENDIX A — MEMORANDUM DECISION OF THE NEW YORK SUPREME COURT, ALBANY COUNTY, DATED MARCH 22, 1982

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

In the Matter of the Petition of

MR. GEORGE SCHRYVER STEELE and MRS. VALERIE NOEL STEELE, for the Appointment of a Conservator of the Property of OGDEN C. NOEL, SENIOR.

Supreme Court, Albany County Special Term, December 22, 1981

Justice Edward S. Conway, presiding

(In Chambers)

Brought on by Order to Show Cause and Supporting Verified Petition

APPEARANCES:

MR. and MRS. GEORGE SCHRYVER and
VALERIE NOEL STEELE
Petitioners Pro se
2909 33rd Place, N.W.
Washington, D. C. 20008

BOUCK, HOLLOWAY and KIERNAN, Esqs.
Attorneys for Petitioner Ogden C. Noel, Jr.
107 Columbia Street
Albany, New York 12210

Appendix A

CONWAY, J:

This is a special proceeding for an order and judgment appointing George Schryver Steele and Valerie Noel Steele as joint conservators of the person and property of Ogden C. Noel, Senior and/or as the committee of the person and property of the said Ogden C. Noel, Senior, and for an order directing the estate of the decedent Norbert Noel to furnish an accounting of the management of the property of the proposed conservatee Ogden C. Noel, Senior by the decedent Norbert Noel from 1974 to the present date, and to further show cause why an order should not be made directing the estate of Norbert Noel, deceased, and its Executor Ogden C. Noel, Jr. and/or the person or persons presently having the possession, custody and/or control of the property of the proposed conservatee, to commence to make payment to the petitioners who are responsible for the care of the person of the proposed conservatee, to enable petitioners to provide for the care of the person of the proposed conservatee.

A cross-petition was interposed by Ogden C. Noel, Jr., the son of Ogden C. Noel, Sr., the proposed conservatee, and brother of petitioner Valerie Noel Steele, seeking the appointment of Florence Noel Hodgkins, the sister of the proposed conservatee, as conservator of Ogden C. Noel, Sr. in place and in stead of the petitioners on the ground that both he and his sister Valerie Noel Steele have a conflict of interest which precludes either from acting as their father's conservator.

A hearing was held before this Court and testimony taken as to the qualifications, conflicts of interest and the desirability of the appointment to be made as the conservator of the said Ogden C. Noel, Sr. and this Court finds as follows:

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1. This Court is satisfied by clear and convincing proof of the need for the appointment of a conservator of the property of the proposed conservatee Ogden C. Noel, Sr., a resident of this State who, by reason of advanced age, illness and infirmity, has suffered substantial impairment of his ability to care for his property.

2. That in the best interest of the proposed conservatee, Florence Noel Hodgkins, the sister of the proposed conservatee, should be and hereby is appointed conservator of the conservatee Ogden C. Noel, Sr.

3. The inability of the proposed conservatee to be present at the hearing was and is established to the satisfaction of this Court and this Court did, prior to the hearing, appoint as Guardian ad Litem, Jonathan P. Harvey, Esq. to represent the interests of the proposed conservatee and he did appear and present his report in affidavit form recommending that a conservator be appointed.

4. No party to the proceeding raises issues of fact as to the need for the appointment of a conservator nor demands a jury trial thereby waiving the right to trial by jury.

5. This Court directs that a judgment be entered appointing the said Florence Noel Hodgkins conservator of the proposed conservatee Ogden C. Noel, Sr: and that she, before she enters upon the execution of her duties, post an undertaking as provided in Section 78.09 of the Mental Hygiene Law with the amount of the bond to be fixed by this Court on the remainder of the estate and income derived therefrom after the deposit of the securities belonging to the estate of the conservatee are delivered to and deposited with a bank or trust company subject to the

order of the conservator countersigned by this Court with withdrawals from the custody of the bank or trust company only by the special order of this Court, but the conservator may receive and collect interest or income without such order, and further directing that the conservator shall execute, acknowledge and file with the clerk of this Court an instrument designating the clerk as a person in whom service of process may be made pursuant to Section 77.17 of the Mental Hygiene Law, and further providing that the conservator shall have all of the powers and duties provided for in Section 77.19 of the Mental Hygiene Law with the duration of the conservatorship to be perpetual and setting forth the extent of the income and assets which are to be placed under the conservatorship and the Court approved plan required by said Section 77.19 and further provide that she comply with Sections 77.21, 77.29 and 77.31 of the Mental Hygiene Law.

6. The judgment shall further provide that the conservator shall pay to the Guardian ad Litem, Jonathan P. Harvey, Esq. the sum of $750 for his services rendered, and to Bouck, Holloway and Kiernan, Esqs. for its legal fees on the cross-petition the sum of $2,500.

SO ORDERED.

s/ Edward S. Conway
Edward S. Conway
J.S.C.

Signed: 22nd day of March, 1982
Albany, New York.

All papers to Bouck, Holloway and Kiernan, Esqs. for the preparation of the judgment herein directed to be made.

APPENDIX B — JUDGMENT OF THE NEW YORK SUPREME COURT, ALBANY COUNTY, DATED APRIL 15, 1982

At Chambers of the Supreme Court of the State of New York, City and County of Albany, New York on the 15th day of April, 1982.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

IN THE MATTER OF THE PETITION OF MR. GEORGE SCHRYVER STEELE AND MRS. VALERIE NOEL STEELE, FOR THE APPOINTMENT OF A CONSERVATOR OF THE PROPERTY OF OGDEN C. NOEL, SENIOR

JUDGMENT

This is a Special Proceeding for an Order and Judgment appointing George Schryver Steele and Valerie Noel Steele as joint conservators of the person and property of Ogden C. Noel, Senior and/or the committee of the person and property of the said Ogden C. Noel, Senior and for an Order directing the estate of the decedent Norbert Noel to furnish an accounting of the management of the property of the proposed conservator Ogden C. Noel, Senior by the decedent Norbert Noel from 1974 to the present date, and to further show cause why an order should not be made directing the estate of Norbert Noel, deceased, and its executor Ogden C. Noel, Junior and/or the person or persons presently having the possession, custody and/or control of the property of the proposed conservatee, to commence to make payment to the petitioners for the care of the person of the proposed conservatee, to enable petitioners to provide for the care of the person of the proposed conservatee; a cross-petition is

interposed by Ogden C. Noel, Junior, the son of Ogden C. Noel, Senior, the proposed conservatee, and brother of petitioner Valerie Noel Steele seeking the appointment of Florence Noel Hodgkins, the sister of the proposed conservatee as conservator of Ogden C. Noel, Senior in place and stead of the petitioners on the ground that both he and his sister Valerie Noel Steele have a conflict of interest which precludes either from acting as their father's conservator;

NOW, upon reading and filing the Order to Show Cause dated December 9, 1981, and joint petition of George Schryver Steele and Valerie Noel Steele, sworn to the 23rd and 24th days of November, 1981, respectively, and the affidavit of Valerie Noel Steele, sworn to the 9th day of December, 1981, and upon reading and filing the cross-petition of Ogden C. Noel, Junior, sworn to the 29th day of January, 1982 and the affidavit of Ogden C. Noel, Junior sworn to the 14th day of January, 1982 together with the affidavit of John R. Casey, sworn to the 14th day of January, 1982, and the affidavit of John R. Casey sworn to the 4th day of March, 1982, and the Court having ordered that Jonathan P. Harvey, Esq., be appointed Guardian Ad Litem for the proposed conservatee on December 22, 1981, and the said Jonathan P. Harvey having filed his report dated February 17, 1982, and a hearing having been held before this Court and testimony taken as to the qualifications, conflict of interest and the desirability of the appointment to be made as the conservator of the said Ogden C. Noel, Senior on the 22nd day of February, 1982, and the Court having dispensed with the appearance of Ogden C. Noel, Senior, the proposed conservatee, at the aforesaid hearing, and due deliberation having been had, and upon all the evidence adduced and all the prior pleadings and proceedings had heretofore herein, the Court being satisfied by clear and convincing proof that the said Ogden C. Noel, Senior, by reason of advanced

age, infirmity and mental weakness has suffered substantial impairment of his ability to care for his property, and the Court having rendered a written decision and order, dated March 22, 1982, a copy of which is annexed hereto,

NOW, on motion of BOUCK, HOLLOWAY AND KIERNAN, John R. Casey, of counsel, attorneys for the cross-petitioner, Ogden C. Noel, Junior, it is

ORDERED AND ADJUDGED, that there is a necessity for the appointment of a conservator of the property for the above-named conservatee, and it is further

ORDERED AND ADJUDGED, that Florence Noel Hodgkins, 77 Cooper Street, New York, New York, be and she is hereby appointed conservator of the property of the said Ogden C. Noel, Senior, conditioned that she will in all things faithfully discharge the trust imposed upon her; obey all directions of the Court in respect to the trust; make and render a true and just account of all monies and other properties received by her and the application thereof, and of her acts in the administration of her trust whenever she is so required to do so by report and the designation required by §77.17 of the Mental Hygiene Law; and it is further

ORDERED AND ADJUDGED, that the duration of this conservatorship shall be indefinite; and it is further

ORDERED AND ADJUDGED, that all of the income and assets of the conservatee, Ogden C. Noel Senior, are placed under this conservatorship; and it is further

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ORDERED AND ADJUDGED, that the plan of the conservator for the preservation, maintenance, and care of the conservatee's income, assets and personal well-being are hereby approved; and that the conservator shall retain a bank or trust company to be selected by the conservator and shall deposit all of the assets of the said Ogden C. Noel, Senior in an investment advisory account with said bank or trust company subject to the Order of the conservator counter-signed by this Court with withdrawals of principal of said account from the custody of the bank or trust company only by the ex parte Order of this Court, and the said bank or trust company shall receive custody of all assets and receive all income and pay all routine expenses for the benefit of Ogden C. Noel, Senior, including, without limitation hospital, nursing and day to day expenses and will provide monthly statements to the conservator as well as preparing an annual accounting to be filed with the Court and annual income tax returns for the conservator and make recommendations regarding the securities held by said bank or trust company for the conservator and the said bank or trust company shall be paid the same commissions for performing its aforesaid duties as an executor or administrator pursuant to §2307 of the Surrogate's Court Procedure Act; and it is further

ORDERED AND ADJUDGED, that Florence Noel Hodgkins shall receive no compensation as conservator since she has waived compensation except that she shall be reimbursed for any out-of-pocket expenses incurred by her as conservator; and it is further

ORDERED AND ADJUDGED, that the filing of a bond as required by § 77.13 and 77.09 of the Mental Hygiene Law; and it is further

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ORDERED AND ADJUDGED, that a commission in due form of law shall be issued to the conservator, Florence Noel Hodgkins, by the Clerk of the County of Albany; and it is further

ORDERED AND ADJUDGED, that all persons are hereby directed and commanded to deliver to the said conservator, upon demand and presentation of a certified copy of the said commission, all the property of the said conservatee, of any kind and nature which may be in their possession or under their control; and it it further

ORDERED AND ADJUDGED, that the conservator shall execute, acknowledge and file with the Clerk of the County of Albany an instrument designating the Clerk of the County of Albany as a person upon whom service of process may be made pursuant to § 77.17 of the Mental Hygiene Law, and it is further,

ORDERED AND ADJUDGED, that the conservator shall have all of the powers and duties provided for in § 77.19 of the Mental Hygiene Law, and it is further,

ORDERED AND ADJUDGED, that the conservator shall comply with §§ 77.21, 77.29 and 77.31 of the Mental Hygiene Law, and it is further

ORDERED AND ADJUDGED, that the said conservator pay out of the funds in her hand to BOUCK, HOLLOWAY AND KIERNAN, attorneys for the cross-petitioner, Ogden C. Noel, Junior, the sum of $2,500.00 for its legal fees and necessary disbursements; and it is further

ORDERED AND ADJUDGED, that the conservator pay to Johathan P. Harvey, Esq., for services rendered by him as Guardian ad Litem herein the sum of $750.00.

Appendix B

DATED: 4-15-82
ENTER: ALBANY, N.Y.

s/ Edward S. Conway
J.S.C.

APPENDIX C — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, MARCH TERM, 1983

In the Matter of the Appointment of a Conservator of the Property of OGDEN C. NOEL, SR., GEORGE S. STEELE, et al., Appellants, OGDEN C. NOEL, JR., Respondent. — Appeal from a judgment of the Supreme Court at Special Term (Conway, J.), entered April 26, 1982 in Albany County, which, in a proceeding pursuant to article 77 of the Mental Hygiene Law, denied petitioners' application to be appointed conservators of the property of Ogden C. Noel, Sr., and granted cross petitioner's application to appoint the conservatee's sister as conservator. The need for a conservator for Ogden C. Noel, Sr., who is 84 years old, in failing health and a man of means, is clearly established; at issue is who should be designated. Petitioners, daughter and son-in-law of the conservatee, seek the appointment. Cross petitioner, the remaining son of the conservatee, wishes to have conservatee's sister, Florence Noel Hodgkins, named. Evidence of long-standing familial dissension between petitioner Valerie Noel Steele and cross petitioner, both prospective heirs of their father's estate, concerning the claimed mismanagement of the conservatee's property and affairs by the latter's oldest son during his lifetime, permeates the record. Under these circumstances, the decision to appoint Mrs. Hodgkins can hardly be termed an abuse of discretion. Indeed, the parties are fortunate that a knowledgeable family member could be found to perform the task; rancor between family members often begets the appointment of strangers (see *Matter of West*, 13 AD2d 599). Though she is 87 years of age and has recently undergone major surgery, Mrs. Hodgkins is amply qualified to perform the duties of conservator in co-operation with a bank which will act as custodian of the conservatee's assets and provide investment advice. Having done "wonderfully" with her own investments and having served as executrix of several estates, as administratrix of her sister's estate

and currently as a cotrustee with a New Jersey bank overseeing two trust funds, she obviously has considerable relevant experience. These facts, when considered along with Mrs. Hodgkins' close relationship with her brother and the complete absence of any conflict of interest on her part, lead to the conclusion that she was the appropriate choice for conservator (*Matter of Lyon*, 52 AD2d 847, affd 41 NY2d 1056). Inasmuch as the cross petitioner is clearly a "petitioner" within the meaning of subdivision d of section 77.07 of the Mental Hygiene Law, the allowance to him of attorney's fees was proper, and the amount thereof was reasonable. Judgment affirmed, without costs. Kane, J.P., Main, Mikoll, Yesawich, Jr., and Levine, JJ., concur.

APPENDIX D — DECISION OF THE NEW YORK SUPREME COURT, ALBANY COUNTY, DATED JANUARY 25, 1983

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Petition of

GEORGE SCHRYVER STEELE and VALERIE NOEL STEELE for Appointment as Conservators or Committee of the Person and Property of OGDEN C. NOEL.

Supreme Court, Albany County Special Term, January 25, 1983

(By Order to Show Cause)

(In Chambers)

APPEARANCES:

GEORGE SCHRYVER STEELE and
VALERIE NOEL STEELE
Petitioners Pro se
2909 33rd Place, N.W.
Washington, D.C. 20008

KOHN, BOOKSTEIN & KARP, Esqs.
Attorneys for Conservator Florence N. Hodgkins
100 State Street, 6th Floor
Albany, New York 12207

CONWAY, J.:

These are two motions in the above entitled proceeding which this Court will consider together because they are closely related.

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The first is a motion by petitioners George Schryver Steele and Valerie Noel Steele for an order terminating the appointment of Florence N. Hodgkins as conservator of the property of Ogden C. Noel and appointing a successor conservator. Petitioners contend, among other things, that Florence Noel Hodgkins (hereinafter referred to as the conservator) has failed to properly perform her duties as conservator of the Property of Ogden C. Noel (conservatee). The petitioners contend that the conservator fell and broke one hip in May, 1982 and that she broke her other hip in September of 1982. That she became 88 in July of 1982 and she has been in a hospital or nursing home in Ellsworth, Maine since May 24, 1982.

Petitioners further contend that the conservator hired John R. Casey, Esq. in April, 1982 when he was the attorney for Julian H. Hyman and O. Curtis Noel, Jr. when they were co-executors of the estate of Norbert L. Noel. That the conservator and Mr. Casey cooperated with Mr. Hyman to successfully oppose petitioners' application for disclosure under CPLR 3102 of the records of Norbert L. Noel and the records of the conservatee to determine what property of the conservatee had been transferred, if any, to the use and benefit of Norbert L. Noel during the period 1970 to 1981 when the conservatee was, in their opinion, suffering from senility and was unable to understand the legal effect of documents placed before him.

Petitioners further contend that the conservator has done nothing since the date of her appointment to determine what funds of the conservatee were used by or for the benefit of Norbert L. Noel from 1970 to 1981 or any other period or were used by or for the benefit of Mr. Hyman or O. Curtis Noel, Jr.

Petitioners further contend that the conservator has done

Appendix D

nothing to obtain the bank and tax records of the conservatee or Norbert L. Noel to determine what property has been transferred from the conservatee to or for the benefit of Norbert L. Noel, Mr. Hyman or O. Curtis Noel, Jr. during the period 1970 to 1981 or for any other period. Petitioners further contend that the conservator has not investigated the existence, size, nature and use of the paid-up insurance policies of or on the life or health of the conservatee.

Petitioners go on and state many other further contentions of failures of the conservator to marshal the assets of the conservatee.

The conservator contends that she is making good progress in her recovery from the occurrences of her hip fractures and that her prognosis is very good. She further contends that an investigation and inquiry is being conducted by her to ascertain if there are any monies, assets or property in the name of or in the possession, control or custody of third parties which properly belong as part of the conservatorship estate. She has commenced a proceeding before this Court for permission and authority to retain a firm of independent certified public accountants to review and audit the conservatee's tax and financial records as part of said inquiry and investigation which includes the estate of Norbert L. Noel, deceased, which proceeding is the second motion which this Court will decide, together with this motion.

The conservator further contends that she has, at all times since her appointment, diligently and faithfully discharged her responsibilities as conservator of the property of Ogden C. Noel and that she has been serving without fee or compensation therefor. She further contends that the replacement of her as conservator and the appointment of a successor would cause and

result in the imposition of a great and unnecessary financial burden on the conservatorship estate.

This Court is of the opinion that the conservator is proceeding in a proper manner and is doing all that is necessary to carry out the duties of her office of conservator of the property of Ogden C. Noel and, therefore, the petition to terminate her appointment is denied.

The second motion is a motion by the conservator for an order approving and authorizing the conservator to retain a firm of independent certified public accountants to make an audit to determine if there is any substance to the allegations of the petitioners in the first motion addressed in this opinion as to any property in the hands of third parties which properly belongs as part of the conservatorship estate. The conservator contends that in connection with such an inquiry the financial and tax records of the conservatee must be reviewed and analyzed, that there are numerous records and a thorough review and meaningful analysis requires special professional accounting expertise. The conservator proposes that the audit encompass the period January 1, 1976 through November 9, 1981 commencing with an assault on the conservatee which occurred in late January, 1976 and which contributed materially to his present condition requiring a conservator and concluding with the death of his son, Norbert L. Noel, on November 9, 1981.

In opposition to the motion, Valerie Noel Steele contends that her father, the conservatee, began to become senile about 1970 and therefore the audit should commence as of January 1, 1970. She further contends that the audit should continue up to the present time. She further contends that the audit and investigation should be done by Jonathan Harvey, Esq. who has

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been appointed by this Court as a special guardian of the conservatee.

This Court is of the opinion that the motion should be granted with a direction that the audit cover the period from January 1, 1970 to the date of the audit, as requested by Valerie Noel Steele.

The attorneys for the conservator are directed to submit an appropriate order consistent herewith for this Court's signature.

All papers to the Attorneys for the conservator for filing upon entry of the order hereon. Decision mailed 2/25/83.

APPENDIX E — SUMMARY LETTER OF DAVID L. MALANE, PARTNER, ERNST & WHINNEY, DATED MAY 9, 1984

ERNST & WHINNEY
One North Broadway
White Plains, New York 10601
914/761-7888

May 9, 1984

Conservatorship of Ogden C. Noel
c/o Kohn, Bookstein & Karp
100 State Street
Albany, New York 12207

Conservatorship:

We have reviewed the financial records of Ogden C. Noel from 1970 through 1981. We have the following comments:

Securities

We reviewed the deposits of dividends and bond interest, tax returns and other records regarding stocks and bonds. We also reviewed the Inventory and Accounting for the period April 15, 1982 through December 31, 1982. We traced the stocks and bonds held from year to year from 1970 through 1981 and into the 1982 Accounting. We found nothing in the reviewed information to indicate that any securities were missing.

Checking Accounts

We reviewed the disbursements and receipts in the checking accounts. Schedule A-1 summarizes the disbursements, Schedule

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A-2 summarizes the receipts and Schedule A-3 contains notes regarding checking account items.

Savings Accounts

We reviewed the records to determine which savings accounts existed and we reviewed all available passbooks. Schedule B-1 lists the savings accounts with applicable notes and information. Schedule B-2 lists the savings accounts for which no passbooks were available to review and Schedule B-3 shows the dispositions of these savings accounts. Schedule B-4 contains the analysis of the available passbooks, including a summary page.

Transactions With Family Members

The checking accounts contained receipts and disbursements with family members, as shown on Schedules A-1, A-2 and A-3. In addition, Schedules C-1 and C-2 contain information regarding transactions with family members.

In 1976, Ogden transfered the house at 22 Coolidge Avenue, White Plains, to Norbert. Other than this transfer, Ogden's records and notes regarding loans, gifts and other transactions with family members indicate he attempted to treat all family members equal and he noted his reasons for transfering or not transfering amounts. We found nothing to indicate that any family member received substantially more funds than any other member.

Untraced Items

Because many savings account passbooks were unavailable, it was not possible to trace all bank items into and out of accounts. These items are listed as "untraced" on the various Schedules.

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In addition, dividends and bond interest deposits were made into the savings accounts beginning in 1975. Schedule C-2 contains our analysis as to the amounts of these deposits that we believe were deposited to savings accounts where the passbooks were available to us.

Schedule C-3, contains a summary of untraced bank items. The untraced items withdrawn from bank accounts exceeded the untraced items deposited by approximately $17,000.00. We did not expect these to equal, as there were many unavailable passbooks which would have deposits, withdrawals and transfers. Subject to the fact that there were missing passbooks, our analysis shows that there were no substantial amounts of withdrawn funds that cannot be explained or assumed transfered to other accounts.

Summary

Other than missing savings account passbooks, we found the financial records to be in good order. We found nothing in these financial records indicating that any securities or funds were missing or misappropriated.

Very truly yours,

s/ David Malane
Partner

DLM:rc

APPENDIX F — DECISION OF THE NEW YORK SUPREME COURT, ALBANY COUNTY, MAILED MARCH 21, 1985

STATE OF NEW YORK
SUPREME COURT
COUNTY OF ALBANY

In the Matter of the Petition of

GEORGE SCHRYVER STEELE and VALERIE NOEL STEELE for Appointment as Conservators or Committee of the Person and Property of OGDEN C. NOEL.

Supreme Court, Albany County Special Term, October 9, 1984

Justice Edward S. Conway, presiding

(In Chambers)

APPEARANCES:

MRS. VALERIE NOEL STEELE
Petitioner Pro se
2909 33rd Place Northwest
Washington, D.C. 20008

BOUCK, HOLLOWAY, KIERNAN & CASEY, Esqs.
Attorneys for Respondents Curtis Noel Jr. and Julian Hyman
John R. Casey, Esq., of Counsel
107 Columbia Street
Albany, New York 12210

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KOHN, BOOKSTEIN & KARP, Esqs.
Attorneys for Conservatrix Florence H. Hodgkins
Raymond S. Zierak, Esq., of Counsel
100 State Street, 6th Floor
Albany, New York 12207

PETER L. RUPERT, Esq.
Court-Appointed Guardian ad litem
of Ogden C. Noel, Deceased
90 State Street, 6th Floor
Albany, New York 12207

CONWAY, J:

This is a motion brought on by an Order to Show Cause before this Court at Special Term sitting in Chambers on the 9th day of October, 1984 for an order judicially settling and allowing the final accounting submitted by the conservatrix Florence N. Hodgkins herein, and further ordering, fixing and allowing attorney's fees of Kohn, Bookstein and Karp, attorneys for the said conservatrix, for services rendered by them herein, and further ordering, fixing and allowing the fees to be paid to the Banker's Trust Company for services rendered herein, and further ordering and directing that the report proposed by Ernst & Whinney of the financial records of the deceased conservatee be filed with the clerk of this Court and with the clerk of the Supreme Court Westchester County, and ordering that all matters and issues relating to the matters embraced by the report be referred to the Surrogate's Court of Westchester County for determination, and ordering and directing that the fee of Ernst & Whinney be paid in the sum or $25,000 from the funds in the hands of the conservatrix for its work in reviewing the conservatee's (now deceased) records and preparing the report, and ordering that the

outstanding expenses listed in the final accounting be paid, and ordering that the balance remaining after payment of the attorney's fees, claims, fees of the Banker's Trust Company and the fee of Ernst & Whinney be turned over to the co-executors of the estate of Ogden C. Noel, deceased, and ordering the discharge and release of Florence N. Hodgkins and Transameric Insurance Company, the surety on her bond, from any and all further liability and responsibility for all matters herein.

After considering all of the objections of Valerie Noel Steele to the final inventory and account of Florence N. Hodgkins, conservatrix, and all of the supporting papers including the sworn affidavit of Raymond S. Zierak, Esq. of the law firm of Kohn, Bookstein & Karp, Esqs. and the sworn affidavit of Florence N. Hodgkins, conservatrix, it is the opinion of this Court that the motion of the said conservatrix should be and hereby is granted in all respects and the attorney's fees of Kohn, Bookstein & Karp, Esqs. are fixed and allowed in the sum of $8,000, together with expenses of $477.71 for a total allowance of $8,477.71, and the fees of Banker's Trust Company for its services are fixed and allowed in the sum of $25,979.57.

The attorneys for the conservatrix are directed to submit an order consistent herewith.

All papers to the Attorneys for the Conservatrix
to be entered with the final order herein.
Decision mailed 3/21/85.

APPENDIX G — DECREE OF THE NEW YORK SURROGATE'S COURT, WESTCHESTER COUNTY, DATED JANUARY 7, 1985

At a Surrogate's Court held in and for the County of Westchester at the Surrogate's Office, in the City of White Plains, on the 7th day of January, 1985

PRESENT:

HON. EVANS V. BREWSTER,
Surrogate

File # 1181/84

PROBATE PROCEEDING, WILL OF,

OGDEN C. NOEL,

Deceased.

DECREE

A DULY VERIFIED PETITION, having been presented by OGDEN C. NOEL, JR. and JULIAN H. HYMAN acknowledged the 16th day of April, 1984 and duly filed on the 17th day of April, 1984, for the probate of a paper writing dated the 22nd day of March, 1976 purporting to be the Last Will and Testament of OGDEN C. NOEL, late of the City of White Plains in said County, deceased, setting forth the facts upon which the jurisdiction of the Court to grant probate thereof depends, and praying that same might be proved, and that the persons in said petition mentioned might be cited to attend the probate thereof,

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and a citation in due form of law having been issued by the Surrogate to all persons required by law to be cited or who are interested in this proceeding, citing them and requiring each of them to be and appear at the Surrogate's Office in the City of White Plains, in said County, on the 11th day of May, 1984, and show cause why the relief prayed for in said petition should not be granted and why the said writing dated March 22, 1976 should not be probated as the Last Will and Testament, relating to real and personal property of said OGDEN C. NOEL, deceased, and an Order for Mailing of said citation upon VALERIE NOEL STEELE having been duly made and filed on the 17th day of April, 1984, and said citation having been returned with proof that all persons to whom said citation was directed had been duly served with the same, or had duly appeared herein, and no other parties or persons having appeared in this proceeding except that VALERIE NOEL STEELE, having appeared pro se and having filed an Answer on May 7, 1984 containing certain objections to the admission to probate by this Court of the said Last Will and Testament of the decedent, alleging that decedent was a resident of Albany County at the time of his death and that this Court had no jurisdiction over his estate, that the Surrogate herein knew the deceased, his wife and one of his children and therefore said Surrogate should not preside over this proceeding, that the decedent did not sign the propounded instrument, that the decedent lacked the requisite capacity to execute his Last Will at the time that said propounded instrument was executed, that said propounded instrument was executed by decedent only under restraint and undue influence of decedent's son, NORBERT L. NOEL and one of the petitioners herein, and that both petitioners herein are not proper persons to represent the estate of said decedent because they are co-executors of the estate of decedent's predeceased son, NORBERT L. NOEL, and demanding a jury trial as to all of said objections; and upon the return date of said

citation, the Surrogate directed an intermediate hearing to determine the jurisdictional objection, and the matter having duly come on to be heard on June 5, 1984 before the HON EVANS V. BREWSTER, Surrogate, and HYMAN & GILBERT, P.C. by RITA K. GILBERT, ESQ., having appeared for petitioners, and GEORGE SCHRYVER STEELE, ESQ., husband of objectant and an attorney admitted to practice in the District of Columbia and the State of Massachusetts, having appeared for objectant with consent of petitioners and by permission of the Surrogate, and due deliberation having been had thereon, the Surrogate by Memorandum Decision in writing dated and filed June 20, 1984, having dismissed said jurisdictional objection and a Decree thereon dated July 13, 1984 having been served upon objectant and duly made by said Surrogate and filed in the office of the Clerk of this Court, and petitioners having duly filed a petition acknowledged the 4th day of June, 1984 having been made by said Surrogate and filed in the office of the Clerk of this Court, on June 14, 1984 granting preliminary letters testamentary to petitioners upon their filing a bond in the sum of $100,000.00, and the petitioners having filed Bond -74S100037121BCA issued by the Aetna Casualty and Surety Company and thereafter and on July 2, 1984 preliminary letters testamentary were duly issued to petitioners, and petitioners having duly served and filed a Notice of Motion dated July 26, 1984 for an order dismissing the remaining objections contained in the answer of objectant and objectant by response sworn to the 15th day of August, 1984, having withdrawn all of her remaining objections except as to the qualification of the petitioners herein to act as executors of decedent's estate, and said Surrogate, by Memorandum Decision in writing dated October 1, 1984 which constituted the order thereon having denied petitioners' motion to dismiss the remaining objection and having set a hearing date for said remaining objection for December 20, 1984 and Bank of New York having

duly executed and filed a Waiver of Notice of Objections dated October 5, 1984, and petitioners having duly filed a petition verified the 11th day of October, 1984 for a nunc pro tunc order extending and continuing the preliminary letters issued to petitioners herein to and including the 18th day of December, 1984, and an order thereon dated October 11, 1984 extending said preliminary letters testamentary having been made by said Surrogate and filed in the office of the Clerk of this Court, and petitioners having duly served a Demand for a Bill of Particulars dated October 16, 1984, and objectant having duly served a Notice to Produce dated October 26, 1984, and objectant having duly served a Notice to Admit dated October 30, 1984 and objectant having duly served and filed a Notice of Motion dated October 23, 1984 for an order disqualifying the HON EVANS V. BREWSTER, from further participation in all proceedings relating to this estate, and said Surrogate, by Memorandum Decision in writing dated November 29, 1984 which constituted the order thereon having denied the motion in its entirety, and petitioners having duly served and filed a Notice of Motion dated November 1, 1984 for an order striking the jury demand filed by objectant, and said Surrogate, by Memorandum Decision in writing dated November 21, 1984 which constituted the order thereon having granted the motion with Twenty ($20.00) Dollars costs to petitioners, and objectant having duly served and filed a Notice of Motion dated November 13, 1984 for an order to take the deposition of DR. DAVID PANKIN, and petitioners having duly served and filed a Notice of Cross-Motion filed November 23, 1984 for a probate order against the taking of a deposition of DR. DAVID PANKIN, and said Surrogate by Memorandum Decision in writing dated November 30, 1984 which constituted the order thereon having denied the motion of objectant and having dismissed petitioner's cross-motion with Twenty ($20.00) Dollars costs to petitioners, and petitioners having duly served

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and filed a Notice of Motion dated November 14, 1984 for an order precluding from the hearing herein all evidence which objectant failed to furnish pursuant to a Demand for a Bill of Particulars served by petitioners, and said Surrogate, by Memorandum Decision in writing dated December 6, 1984 having ordered objectant to serve a Bill of Particulars in response to petitioners' demand and an Order thereon dated December 17, 1984 having been served upon objectant and duly made by said Surrogate and filed in the office of the Clerk of this Court, and objectant having duly served and filed a Notice of Motion dated November 14, 1984 for an order granting summary judgment on the sole issue to be tried at the hearing herein, and said Surrogate, by Memorandum Decision in writing dated November 30, 1984 which constituted the order thereon having denied the motion with Twenty ($20.00) Dollars costs to petitioners, and objectant having duly served and filed a Notice of Motion dated November 18, 1984 for an order postponing the hearing herein and directing petitioners to provide further responses to objectant's Notice to Admit and Notice to Produce, and said Surrogate, by Memorandum Decision in writing dated December 7, 1984 which constituted the order thereon having denied the request for a further response to the Notice to Produce but having granted the request for a further response to objectant's Notice to Admit, and petitioners having duly served said further response sworn to December 13, 1984, and petitioners having duly filed a petition for an order extending and continuing the preliminary letters issued to petitioners herein to and including the 15th day of March, 1985, and an order thereon extending said preliminary letters testamentary dated December 14, 1984 having been made by said Surrogate and filed in the office of the Clerk of this Court, and objectant having duly served and filed a withdrawal allegedly sworn to on December 13, 1984 withdrawing her remaining objection as to the qualification of the petitioners herein to serve as

fiduciaries of decedent's estate, and the said matter having come on to be heard before the said Surrogate on December 20, 1984 and HYMAN & GILBERT, P.C. by RITA K. GILBERT, ESQ, having appeared for petitioners and objectant having failed to appear, and the withdrawal of objectant's objection having been heard and recorded into the record of this Court, and the said Surrogate, by Memorandum Decision in writing dated December 20, 1984 having found the propounded instrument to have been duly executed by decedent while competent and free from restraint;

NOW on motion of HYMAN & GILBERT, P.C. by ALBERT A. CICCHETTI, ESQ., attorneys for petitioners, it is

ORDERED, ADJUDGED AND DECREED, that the paper writing so propounded as the Last Will and Testament of the said OGDEN C. NOEL, late of the City of White Plains, in said County, deceased, was duly executed, that the said testator was at the time of the executing it in all respects competent to make a Will and was not under restraint; and it is further

ORDERED, ADJUDGED AND DECREED, that said paper writing be admitted to probate as the Will of said OGDEN C. NOEL, deceased, valid to pass both real and personal property, and that said paper writing and this decree be recorded, and it is further

ORDERED, ADJUDGED AND DECREED, that Bond #74S10037121BCA issued by Aetna Casualty and Surety Company be and the same is hereby cancelled and the Aetna Casualty and Surety Company as surety thereon is hereby discharged of all liability thereunder; and it is further

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ORDERED, ADJUDGED AND DECREED, that the preliminary letters testamentary, heretofore issued to petitioners on or about the 14th day of December, 1984 are hereby revoked, and it is further

ORDERED, ADJUDGED AND DECREED, that due notice as required by law, that the said Will has been offered for probate, having been served and filed, together with proof by affidavit of the mailing of a copy of such notice to each and every legatee, devise or beneficiary as set forth in the petition, and it appears that JULIAN H. HYMAN and OGDEN CURTIS NOEL, JR., the persons named in said Will as the executors thereof, being duly qualified according to law, Letters Testamentary thereupon forthwith shall issue to them, and it is further

ORDERED, ADJUDGED AND DECREED, that the ESTATE OF OGDEN C. NOEL receive from VALERIE NOEL STEELE the sum of $383.55 for costs and disbursements as allowed and taxed.

s/ Evans V. Brewster
SURROGATE

APPENDIX H — ORDER OF THE NEW YORK SURROGATE'S COURT, WESTCHESTER COUNTY, DATED MARCH 30, 1987

At a Surrogate's Court, held in and for the County of Westchester at the Surrogate's office in the City of White Plains on the 30th day of March, 1987.

PRESENT: HON. EVANS V. BREWSTER, SURROGATE

File # 1181/1984

Accounting of Jean Hyman as Executrix of Julian H. Hyman, Deceased, and Ogden C. Noel, Jr. as surviving Executor of the Estate of

OGDEN C. NOEL,

Deceased.

ORDER

On reading and filing the Petition of Jean Hyman and Ogden C. Noel, Jr. verified the 30th day of June, 1986, praying for a order permitting OGDEN C. NOEL, JR to continue to act as sole Executor, judicially settle the final accounting, that Jean Hyman be awarded an allowance in lieu of commissions in the sum of $9,145.00 for the services rendered by JULIAN H. HYMAN, deceased executor, that legal fees in the sum of $35,186.00 and disbursements of $2,282.14 be awarded the firm of Hyman & Gilbert, P.C. and that a reserve for taxes be held by the sole surviving executor in the sum of $21,000.00 and that JULIAN H. HYMAN be discharged from all liability as executor herein,

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And a citation having been issued by this Court citing VALERIE NOEL STEELE, INTERNAL REVENUE SERVICE, and the NEW YORK STATE TAX COMMISSION to show cause before this Court on the 10th day of October, 1986 why a judicial settlement should not be had of the accounts of OGDEN C. NOEL, JR and JEAN HYMAN and such citation having been returned with proof of due service thereof,

And Objections to the aforesaid Accounting were filed by VALERIE NOEL STEELE dated October 6, 1986, and by the New York State Tax Commission dated September 25, 1986,

And the Petitioners having brought a Motion to Dismiss the Objections of VALERIE NOEL STEELE (as the objections of the NY State Tax Commission were satisfied by filing a NY Tax Motion and an Order Fixing Tax, was signed on November 25, 1986) and said motion was returnable on November 21, 1986 and the objectants having filed a motion in opposition to dismiss objections to Accounting dated November 13, 1986 and the Petitioners having filed a REPLY AFFIDAVIT dated November 20, 1986 and a MEMORANDUM DECISION dated February 19, 1987 having been signed by the Honorable EVANS V. BREWSTER,

NOW on motion of Hyman & Gilbert, PC, attorneys for petitioners is is

ORDERED, that the Objections listed in Part 1, which refer to assets owned by the decedent prior to December 31, 1981 be dismissed as these were assets which were under the aegis of decedent's conservator and not his executors and it is further

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ORDERED that the motion to dismiss Part II of the Objections Concerning legal fees, commissions and an allowance in lieu of commissions to a deceased fiduciary is decided as issues concerning legal fees and executors commissions exist and it is further

ORDERED that respondent-objectant is directed to proceed to examine the executor within 30 days of the date of the Order herein.

s/ Evans V. Brewster
SURROGATE

APPENDIX I — MEMORANDUM DECISION OF THE NEW YORK SURROGATE'S COURT, WESTCHESTER COUNTY, DATED FEBRUARY 19, 1987

SURROGATE'S COURT : WESTCHESTER COUNTY

File No. 1984/1181

Accounting of Jean Hyman as Executrix of Julian H. Hyman, Deceased and Ogden C. Noel, Jr., as surviving Executor of the Estate of

OGDEN C. NOEL,

Deceased.

MEMORANDUM DECISION

Hyman & Gilbert,
Attorneys for Petitioners

Robin A. Bikkal,
Attorney for State Tax Comm.

Valerie Noel Steele,
Respondent Pro Se

BREWSTER — S.

Objections have been filed by a daughter of the decedent to the final accounting proceeding by the executors of decedent's estate, one of whom is her brother. The objectant also filed objections in other proceedings brought by her brother as a fiduciary in the estates of a deceased brother and their mother. The petitioners have moved for an order dismissing the objections

because they refer to matters for which the executors had no responsibility or accountability.

On April 22, 1982, decedent's sister was appointed the conservatrix of his assets by a Justice of the Supreme Court. Because of the rancor and recriminations engendered during the course of the proceeding, the Court directed that a well known and respected firm of public accountants prepare an audit of all assets of the decedent for the years 1970 through 1981.

The decedent died on April 11, 1984. His will dated March 22, 1976 was admitted to probate on January 7, 1985. Upon his death, the conservatorship terminated. A final account was submitted by the conservatrix on May 9, 1984 together with the report of the accounting firm of decedent's assets. Notice of this accounting was served upon all interested parties and objections thereto were filed by the objectant in this proceeding. The order of Mr. Justice Edward S. Conway, Justice of the Supreme Court, dated March 22, 1985, dismissed the objections filed; approved, allowed and judicially settled the account submitted by the conservatrix. After providing for the payment of fees, allowances and expenses, the order directed that the balance remaining be paid to the executors of this estate. Schedule A of the accounting herein lists all of the assets received from the conservatrix.

Part 1 of the objections is directed to the omission of 25 items from Schedule A of the account. All of the unlisted assets, except item 2, describe transactions which occurred prior to December 31, 1981. Item 2 objects to the omission of untraced funds approximating $17,000.00 identified in the report made by the public accounting firm. All the objections listed in Part 1 refer to assets which were owned by the decedent prior to December 31, 1981 for which the conservatrix appointed for him received,

should have received or should have recovered and which were accounted for by her or should have been accounted for by her. While this court has not been provided with a copy of the objections made to the accounting of the conservatrix, the executor- movant alleges that these same objections were made in the accounting proceedings of the conservatrix. Even if not made, they could have been made and should have been made to the account of the conservatrix and cannot at this time be relitigated. The account of the conservatrix was formally approved and a final decree entered thereon.

The account filed by the petitioners in this proceeding lists all the items turned over by the conservatrix to the executors. Accordingly, Part 1 of the objections to the accounting filed herein are dismissed.

Part II of the objections is directed to legal fees, commissions and allowance in lieu of commissions to a deceased fiduciary. Issue having been raised concerning the legal services performed in the representation of the estate, commissions of the surviving executor and the allowance requested by the executors of the deceased fiduciary in lieu of commissions, a court determination of the amounts to be paid is required. The motion to dismiss the objections in Part II of the objections is denied.

Part III of the answer demands the examination of the executors as provided by the statute [SCPA 2211 (2)]. The respondent-objectant is directed to proceed to examine the executors within 30 days of the date of the order herein.

Settle order.

February 19, 1987.

SURROGATE

APPENDIX J — DECISION AND ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, ENTERED AUGUST 1, 1988

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

2490j
C/eb

Submitted — June 23, 1988

AD2d

ISAAC RUBIN, J.P.
SYBIL HART KOOPER
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

1459E

In the Matter of Ogden C. Noel, deceased.
Jean Hyman, etc., et al., respondents;
Valerie Noel Steele, appellant.

DECISION & ORDER

Valerie Noel Steele, Washington, D.C. (George S. Steele on the brief), appellant *pro se*.

Hyman & Gilbert, New Rochelle, N.Y. (Donna R. Kramer of counsel), for respondents.

In a proceeding for an accounting of the executors of the estate of the decedent Ogden C. Noel, the objectant appeals from

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so much of an order of the Surrogate's Court, Westchester County (Brewster, S.), dated March 30, 1987, as dismissed certain of her objections.

ORDERED that the order is affirmed insofar as appealed from with costs payable by the appellant.

The Surrogate's dismissal of the challenged objections was appropriate, as these objections referred to the alleged misappropriation and waste of assets owned by the decedent during his lifetime and prior to the appointment of a conservatrix to oversee his affairs. The Surrogate properly construed a previous order of the Supreme Court. Albany County (Conway, J.), which judicially settled the accounts of the conservatrix upon the death of the decedent, as having disposed of the objections set forth by the instant objectant in that proceeding which were virtually identical to those she now raises in the present proceeding (*see generally, Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304). Moreover, the objectant's claim that the failure to hold a hearing with respect to her objections amounts to a denial of due process is without merit, as she had received notice of and exercised her opportunity to be heard in prior extensive litigation regarding all aspects of the decedent's affairs.

RUBIN, J.P., KOOPER, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

stamped/
MARTIN H. BROWNSTEIN
MARTIN H. BROWNSTEIN
Clerk

Filed August 11, 1988

APPENDIX K — SLIP OPINION OF THE NEW YORK COURT OF APPEALS, ENTERED NOVEMBER 29, 1988

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of November, A.D. 1988

Present, HON SOL WACHTLER, Chief Judge, presiding

Mo. No. 1311 SSD 98

In the Matter of Ogden C. Noel,
Deceased.

Jean Hyman, &c., et al.,

Respondents,

Valerie Noel Steele,

Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the order appealed from does not finally determine the proceeding within the meaning of the Constitution.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX L — ORDER OF THE NEW YORK SURROGATE'S COURT, WESTCHESTER COUNTY, DATED OCTOBER 1, 1987

At a Surrogate's Court held in and for the County of Westchester at the Surrogate's Office, in the City of White Plains, on the 1st day of October, 1987.

PRESENT:

HON. EVANS V. BREWSTER,

Surrogate

File #1181/84

Accounting of JEAN HYMAN as Executrix of JULIAN H. HYMAN, Deceased and OGDEN C. NOEL, JR., as Surviving Executor of the Estate of

OGDEN C. NOEL,

Deceased.

DECREE

OGDEN CURTIS NOEL, JR. and JEAN HYMAN as Executrix of the Estate of JULIAN H. HYMAN, deceased Co-Executor of the Estate of OGDEN C. NOEL, Deceased, having heretofore filed an Account dated July 1, 1986 covering the period April 11, 1984 to October 13, 1985 and their petition verified June 30, 1985 praying that such account be judicially settled and allowed and that the Court may fix and allow the compensation of Hyman & Gilbert, P.C. and the commissions of a deceased fiduciary and a citation issued on September 8, 1986 directing all persons

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interested in the Estate of said decedent citing them to show cause before this Court on October 10, 1986, at 9:30 o'clock in the forenoon of that day why the relief prayed for in said petition should not be granted, and an Order having been duly made on September 8, 1986 by the Honorable EVANS V. BREWSTER, SURROGATE, allowing petitioner to serve by certified mail a copy of the citation upon VALERIE NOEL STEELE and said citation having been duly returned before this Court with proof of service upon VALERIE NOEL STEELE of both the Citation and the Accounting by certified mail, return receipt requested, and said citation and a copy of the accounting having been personally served by Joseph Schuck on the New York State Tax Commission at 99 Church Street, White Plains, New York on September 17, 1986 and objections to said Account having been filed by VALERIE NOEL STEELE dated October 6, 1986, and by the New York State Tax Commission dated September 25, 1986 and the latter objections having been satisfied by filing a New York Tax State Motion and the Order Fixing Tax signed on November 25, 1986, and the former objections having been divided into three parts; the first of which dealt with matters concerning alleged assets not listed in Schedule A of the Account, most of which dealt with transactions which occurred prior to the ascendancy of the fiduciaries to their executor position, and were dismissed in a Memorandum Decision dated February 19, 1987; Part III of the objections were disposed of by permitting objectants 30 days from the date of the Order to examine petitioners; Part II of the objections dealing with the issue of legal fees and commissions, and said objections having been left for decision to the Surrogate's Court, Westchester County, based upon the Affidavit of Legal Services of Rita K. Gilbert, Esq. of Hyman & Gilbert, P.C. dated May 4, 1987, and the Affidavit in Opposition of VALERIE NOEL STEELE dated July 7, 1987, which upon decision of this Court dated August 20, 1987, does

not contain any evidence of misconduct by the fiduciaries or the attorney upon which objections can be sustained; and the Surrogate after having examined said account, now here finds the state and condition of said account as stated and set forth in the following summary statement as judicially settled and made a part of the decree in this matter, to wit:

The deceased Executor, JULIAN H. HYMAN, is *charged* as follows:

Amount shown by Schedule "A" (Principal received)	$701,726.91
Amount shown by Schedule "A-1" (Realized Increases of Principal)	145.95
Amount shown by Schedule "A-2" (Income Collected)	89,871.93
TOTAL CHARGES	$791,744.79

The deceased Executor, JULIAN H. HYMAN, is *credited* as follows:

Amount shown by Schedule "B" (Realized decreases on principal)	$2,835.94
Amount shown by Schedule "C" (Funeral and administration expenses)	119,767.41
Amount shown by Schedule "D" (Creditors claims actually paid)	75,973.88

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Amount shown by Schedule "E" (Distributions to beneficiaries)	— 0
TOTAL CREDITS	$198,577.23
Balance on hand shown by Schedule "F"	$593,167.56

The foregoing balance of $593,167.56 consisted of $593,167.56 in cash and -0- in other property on hand as of the 13th day of October, 1985.

And pursuant to a subsequent accounting filed with this decree recording all activities in this estate from October 13, 1985 to August 26, 1987 bringing the final accounting down to the present.;

The surviving Executor, OGDEN CURTIS NOEL, JR. is *charged* as follows:

Amount shown by Schedule "A" (Principal received)	$701,726.91
Amount shown by Schedule "A-1" (Realized increases on principal)	3,032.48
Amount shown by Schedule "A-2" (Income collected)	151,657.19
TOTAL CHARGES	$856,416.58

The surviving Executor, OGDEN CURTIS NOEL, JR. is *credited* as follows:

Amount shown by Schedule "B" (Realized decreases on principal)	$2,835.94

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Amount shown by Schedule "C" (Funeral and administration expenses)	180,791.00
Amount shown by Schedule "D" (Creditors claims actually paid)	75,973.88
Amount shown by Schedule "E" (Distributions to legatees, distributees)	328,324.20
TOTAL CREDITS	$587,925.02
Balance on hand as shown by Schedule "F"	$268,491.56

The foregoing balance of $268,491.56 consists of $191,153.87 in cash and $77,337.69 in other property as of the 26th day of August, 1987.

NOW on Motion of Hyman & Gilbert, P.C., attorneys for petitioners it is

ORDERED, ADJUDGED and DECREED, that the Accounting acknowledged by JEAN HYMAN and OGDEN CURTIS NOEL, JR. on July 1, 1986 be accepted as filed, and it is further

ORDERED, ADJUDGED and DECREED that all objections as to executors fees are dismissed and such fees shall be allowed in accordance with Schedule I of the account and the Supplemental Account filed herewith, and it is further

ORDERED, ADJUDGED and DECREED that the legal fees of the firm of attorneys for the Executors are fixed in the amount requested and disbursements shall be taxed as costs, and it is further

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ORDERED, ADJUDGED and DECREED that the firm of Hyman & Gilbert, P.C. having received twenty-five thousand ($25,000.00) dollars on account shall be permitted an additional $10,186.00 in fees plus as disbursements and it is further

ORDERED, ADJUDGED and DECREED that pending final resolution of the Appeal pending before the Appellate Division, Second Department, the firm of the Hyman & Gilbert, P.C. be permitted to retain the sum of twenty-one thousand ($21,000.00) dollars for payment of legal costs and expenses incurred as a result of said appeal, and it is further

ORDERED, ADJUDGED and DECREED that upon making payments herein provided for, JULIAN H. HYMAN, the deceased executor and OGDEN CURTIS NOEL, JR. as Executors of the Last Will and Testament of OGDEN CURTIS NOEL be and they are hereby discharged from any and all further liability for the acts and doings of JULIAN H. HYMAN, deceased, as to all matters embraced in said account and determined by this decree, and it is further

ORDERED that the executor shall account at the foot of the decree for the $21,000.00 of legal fees to be fixed and determined.

By the Court

s/ Evans V. Brewster
SURROGATE

APPENDIX M — DECISION AND ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, ENTERED FEBRUARY 6, 1989

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

0361w
Y/mod

___ AD2d ___ Submitted-December 22, 1988

WILLIAM C. THOMPSON, J.P.
ISAAC RUBIN
ARTHUR D. SPATT
VINCENT R. BALLETTA, JR., JJ.

3501E

In the Matter of Ogden C. Noel, deceased

Jean Hyman, etc., et al., respondents;

Valerie Noel Steele, appellant.

DECISION & ORDER

Valerie Noel Steele, Washington, D.C. (George S. Steele on the brief), appellant *pro se*

Hyman & Gilbert, Larchmont, N.Y. (Donna R. Kramer of counsel), for respondents.

In a proceeding for the settlement of the account of the

executors of the estate of the decedent Ogden C. Noel, the objectant appeals from an order of the Surrogate's Court, Westchester County (Brewster, S.), dated October 1, 1987, which dismissed her objections to the executors' commissions and legal fees.

ORDERED that the order is affirmed, with costs payable by the appellant.

The executors were validly appointed by the Surrogate in January 1985, pursuant to the terms of the decedent's will and over the objections of the objectant (*see,* SCPA 707; *Matter of Foss,* 282 App Div 509). The objectant had alleged a conflict of interest and now raises these same objections under the guise of challenging the executors' commissions contained in the accounting. As she failed to appeal the decree appointing the executors, any challenge to the validity of their appointment is barred by the doctrine of collateral estoppel (*see generally, Schuylkill Fuel Corp. v Nieberg Realty Corp.,* 250 NY 304).

The objectant also claims misconduct on the part of the executors in that they failed to recover assets allegedly wasted during the decedent's lifetime. These allegations of waste were considered on a previous appeal in which we sustained the Surrogate's dismissal of her objections to the assets contained in this accounting (*Matter of Noel,* ____ AD2d ____ [2nd Dept., Aug. 1, 1988]). The objectant fails to raise any new claims of mismanagement or misconduct on the part of the executors since their appointment which would warrant their removal (SCPA 711) or the denial of their commissions (*see, Matter of Bournes,* 7 Misc 2d 848).

Similarly, her claims of professional misconduct on the part

of the attorneys of the estate are without merit. In these well-litigated proceedings the Surrogate found that the fees sought were fully supported by an attorney's affidavit of legal services (*Matter of Freeman*, 34 NY2d 1). In this regard we note that the Surrogate bears the ultimate responsibility to decide what constitutes reasonable compensation (*Matter of Von Hofe*, ____ AD2d ____ [2nd Dept., Dec. 5, 1988]).

THOMPSON, J.P., RUBIN, SPATT and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

February 6, 1989

APPENDIX N — SLIP OPINION OF THE NEW YORK COURT OF APPEALS ENTERED JUNE 8, 1989

2 Mo. No. 624 SSD 42

In the Matter of Ogden C. Noel, Deceased.

Jean Hyman, etc., et al.,

Respondents,

Valerie Noel Steele,

Appellant.

DECISION COURT OF APPEALS JUNE 8, 1989

Appeal from the Appellate Division order dated February 6, 1989 dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

Appeal from the Surrogate's Court order dated March 30, 1987 dismissed without costs, by the Court *sua sponte,* upon the ground that a separate appeal does not lie from that order which has been affirmed by the Appellate Division (NY Const art VI, sec. 3; CPLR 5601).